

**The Energy Facilities Siting
Handbook:**

**An Overview of
the Energy Facilities Siting Board
Review Process**

**The Massachusetts
Energy Facilities Siting Board
One South Station
Boston, MA 02110**

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IMPORTANT NOTE:

PURPOSE

This handbook is not intended as a legal guide. Instead, it provides a general overview of the Siting Board's process for reviewing requests to construct energy facilities. This review process takes the form of an adjudication conducted pursuant to G.L. c. 30A and 980 CMR 1.00. It is each person's responsibility to understand and adhere to applicable statutes and regulations in all proceedings before the Siting Board, and to seek legal counsel if necessary.

There are many federal, state and local agencies that regulate the construction and operation of power plants, electric transmission lines, natural gas pipelines and natural gas storage facilities in Massachusetts. This handbook provides information about one such agency -- the Massachusetts Energy Facilities Siting Board. It includes an introduction to the Siting Board, a detailed description of the Siting Board's review process, and an explanation of the various ways to participate in that process. We hope that this handbook will provide interested citizens, municipalities, and organizations with an initial understanding of the Siting Board's review process. Further information is available at the Siting Board's offices in Boston and on the Siting Board's website at www.state.ma.us/dpu/siting_board.htm.

1. INTRODUCTION

The Massachusetts Energy Facilities Siting Board (sometimes referred to as the "Siting Board") is an

independent state review board located administratively within the Massachusetts Department of Public Utilities ("DPU"). The Siting Board is charged, by state statute, with ensuring a "reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." G.L. c. 164, § 69H. The nine-member Siting Board is made up of the Secretary of Energy and Environmental Affairs, who serves as the Chairman, the Secretary of Housing and Economic Development, the Commissioner of the Department of Environmental Protection, the Commissioner of the Division of Energy Resources, two Commissioners from the DPU, and three public members who are appointed by the Governor.

The Siting Board decides whether prospective developers may construct major energy facilities -- electric generating plants, electric transmission lines, intrastate natural gas pipelines, facilities for the manufacture or storage of natural gas, and various oil facilities -- in Massachusetts. The scope of the Siting Board's review of a proposed facility varies, depending on the type of facility being reviewed. The Siting Board's review of electric generating plants focuses on environmental impacts and mitigation, while its review of other types of facilities considers the need for the proposed facility, the cost of the facility, and its impacts on the environment. Alternatives to a proposed facility, including one or more designated alternate routes for

transmission line and gas pipeline projects, may also be considered.

In addition to conducting facility reviews, the Siting Board may represent the Commonwealth in proceedings before the Federal Energy Regulatory Commission ("FERC") having to do with the construction of energy facilities in Massachusetts. For example, the Siting Board typically intervenes when interstate natural gas pipeline companies petition the FERC to construct major gas pipelines in Massachusetts. The Siting Board also is responsible for coordinating the permitting and licensing of hydropower projects in Massachusetts.

Siting Board Review Process

The Siting Board reviews major energy facilities using an adjudicatory process which, broadly speaking, can be divided into three phases: procedural, evidentiary, and decision. During the procedural phase, the Siting Board lays the groundwork for its formal review of the proposed facility by providing for public notice of the proceeding, holding one or more public comment hearings, determining who may take part in the formal proceeding, and establishing the ground rules and schedule for the evidentiary phase.

The evidentiary phase is the information-gathering portion of the review process. During this phase, parties and

limited participants file the written testimony of their witnesses; these witnesses then respond to written information requests and to oral questioning at evidentiary hearings. Finally, during the decision phase, parties file legal briefs and the Siting Board develops and issues a decision. Each phase is described in greater detail in the following sections of this handbook.

Time Frame

The Siting Board's review of a facility proposal typically is completed within a year; however, the length of the review varies with the type and complexity of the facility proposal.

The Siting Board also customarily mails notice of the applicant's petition to local and state officials who represent the municipality or municipalities where the facility is

2. THE PROCEDURAL PHASE

An energy facility review begins when a prospective developer files with the Siting Board a petition to construct a facility. Milestones in the initial procedural phase of the review include public notice that the petition has been filed, public comment hearing(s), rulings on requests to participate formally in the proceeding, and the establishment of a timetable for the evidentiary phase of the review.

Public Notice

Upon receiving a petition to construct an energy facility in Massachusetts, the Siting Board directs the applicant to:

- (1) publish, prior to the public comment hearing, notice of its proposal to construct the project in at least two newspapers having a reasonable level of circulation within the community or region,
- (2) mail notice to owners of all property within a certain distance of the boundaries of the proposed and alternate sites, if any, for the facility, and
- (3) post notice in the city or town halls of communities in which the proposed project would be located.

proposed. The applicant's full petition must be available at the public library or clerk's office in each community where

the facility is proposed, and at the Siting Board's Boston offices.

Public Comment Hearing and Site Visit

After notice has been published, the Siting Board holds one or more public comment hearings, generally in the city or town where the facility is proposed. The public comment hearing, held in the evening, provides those who attend with an opportunity to learn more about the proposed project and its potential impacts. It also allows the Siting Board staff to learn about the public's concerns. At the public comment hearing, the applicant presents an overview of the proposed facility. Public officials and the general public then have an opportunity to ask questions and make comments about the proposal. The public comment hearing is recorded by a court reporter.

Siting Board staff members also view the site or route where the developer proposes to construct its facility. If the applicant has designated an alternate site or route, staff members visit that site or route as well.

Seeking the Right to Take Part in a Proceeding

Persons or groups who wish to be involved in a Siting Board proceeding beyond the public comment hearing stage may seek either to **intervene as a party**, or to **participate as a limited participant**, by filing a petition with the Presiding Officer assigned to the case. The

petition should clearly describe the petitioner's interest in the proceeding. Persons seeking to intervene or participate as a limited participant should consult the regulations governing intervention and participation in Siting Board proceedings, which can be found at 980 CMR 1.05.

The Presiding Officer reviews all petitions to intervene as a party or participate as a limited participant, and makes a ruling on each petition. In order to intervene as a party, a petitioner must demonstrate that he or she is, or may be, "substantially and specifically affected" by the proceeding. The issues raised in the petition to intervene must be specific to the potential intervenor, must fall within the scope of the Siting Board's review, and must go beyond a general expression of concern about quality of life or property values. For example, to support a petition to intervene as a party, a town might claim that a transmission line project will improve the reliable delivery of electricity to its citizens; a conservation commission might cite the need to protect a river bank area which could be affected by a project's water use or discharges; or an individual whose property abuts or is near to a project site might state that he is concerned about noise or about the view from his backyard. Individuals or groups that are permitted to intervene as a party are known as "intervenors". Persons or groups seeking to participate as a limited participant need not demonstrate "substantial and specific" interest;

however, a petition to participate as a limited participant should state the petitioner's interest in the proceeding.

Legal Counsel

The Siting Board requires most intervenors to be represented by an attorney, unless granted a waiver by the Presiding Officer. Individuals appearing *pro se* and limited participants are not required to be represented by an attorney. However, the Siting Board recommends that all persons involved in a Siting Board proceeding obtain legal representation. All participants, whether or not represented by an attorney, must abide by legal conventions and adhere to the laws and regulations governing the Siting Board. The Siting Board staff is not permitted to provide legal advice of any kind to parties or limited participants.

The Procedural Conference

After ruling on all petitions to intervene as a party and participate as a limited participant, the Presiding Officer typically convenes a procedural conference to establish a procedural schedule for issuing information requests and filing written testimony, and to set a date for the commencement of evidentiary hearings. This schedule may change during the course of the proceeding; however, those involved in a Siting Board proceeding are expected to meet all deadlines in the procedural schedule unless the Presiding Officer grants a party's request for an extension in advance of the deadline.

Parties and Limited Participants: A Comparison

The rights of a party in a Siting Board proceeding are more extensive than those of a limited participant.

A party typically may:

- * Issue information requests and receive responses,
- * Present written testimony and witnesses,
- * Cross-examine witnesses,
- * File a brief,
- * Review the Tentative Decision,
- * Address the Siting Board at its meeting, and
- * Appeal a Final Decision.

A limited participant typically may:

- * Receive copies of information requests and testimony in a proceeding,
- * Receive copies of responses to information requests upon request,
- * File a brief,
- * Review the Tentative Decision, and
- * Address the Siting Board at its meeting.

3. THE EVIDENTIARY PHASE

During the evidentiary phase of a proceeding, the Siting Board develops a factual record upon which to base its decision. The Siting Board's decision must be based solely on information that has been properly admitted into the evidentiary record during the proceeding. Such evidence typically is provided by witnesses sponsored by the applicant and by intervenors. Each witness provides an initial written direct case and then responds to written and oral questions. This process is further described below.

Direct Case - The Applicant

The applicant's direct case consists of its initial petition, the testimony of each of its expert witnesses, and any other evidence (applications for permits from other state or local agencies, for example) that it properly submits to support its case. The applicant typically presents the bulk of its direct case in written form prior to the evidentiary hearings. Additional verbal testimony and written documentation may be offered during the evidentiary hearings.

Direct Case - Intervenors

If they wish, intervenors also may present a direct case by sponsoring a witness or witnesses who present written and oral testimony on specific issues pertaining to the applicant's proposal. The Presiding Officer will establish a schedule for the submission of testimony by intervenor witnesses. Limited participants may not sponsor witnesses.

Pre-Filed Testimony

The initial written testimony of any witness is called "pre-filed testimony". A witness' pre-filed testimony should first present his or her qualifications or familiarity with the subject of his or her testimony, and then set forth relevant information through a series of questions to the witness, each followed by the witness' response. Pre-filed testimony may reference analyses performed by the witness, as well as relevant documentary evidence such as published reports, photographs of features in the project area, or noise measurements. Copies of any such materials must be provided if they have not already been entered into the record as part of the applicant's direct case, or as part of the applicant's responses to discovery. Any witness who submits pre-filed testimony must be available to respond to written discovery regarding that testimony, and to testify at an evidentiary hearing at the Siting Board's office in Boston during business hours.

Discovery

The purpose of discovery is to provide for access to relevant information prior to the start of evidentiary hearings.

Discovery consists of written questions and requests for pertinent documents. Typically, the Siting Board and intervenors may direct discovery to the applicant. If an intervenor presents a direct case, the Siting Board staff and

the applicant may direct discovery to that intervenor.

Intervenors may not direct discovery to other intervenors without specific permission from the Presiding Officer.

Information requests and responses must be filed in accordance with the procedural schedule. Responses to discovery must be dated, must include the name of the witness who prepared the response, and must be presented in the format specified by the Presiding Officer. All witnesses responsible for responding to discovery must also be made available for cross-examination under oath at the evidentiary hearings.

Evidentiary Hearings

The purpose of the evidentiary hearing is to further develop the evidentiary record through the examination of witnesses under oath. Evidentiary hearings are open to the public; however, only parties may offer or question witnesses. Hearings are held at the Siting Board's office at One South Station in Boston during normal business hours.

Evidentiary hearings are conducted by the Presiding Officer assigned to the case, who establishes the witness schedule after consulting with the parties to determine when their witnesses will be available. Generally, the applicant's witnesses appear first, followed by the intervenor witnesses. The witness schedule is subject to change during the course of hearings.

At the evidentiary hearings, each witness is sworn in by the Presiding Officer. The witness then provides his or her direct oral testimony adopting, clarifying, and as necessary, amending his or her pre-filed testimony and responses to discovery. The witness is then subject to cross-examination by the Siting Board staff and other parties. Cross-examination provides staff members and parties with an opportunity to clarify confusing areas in a witness' testimony or responses to discovery.

On occasion, a witness may be unable to respond to a specific question during cross-examination, due to the complexity of the subject or the absence of documentation. In such cases, the questioner may ask to make a record request for the information. If the record request is allowed, the witness must provide a written response to the question at a time determined by the Presiding Officer; generally, responses are provided one to two weeks after the request is made.

Following cross-examination, witnesses may be subject to re-direct examination on issues raised during cross-examination, and to re-cross-examination on issues raised during re-direct examination.

Closing the Record

After evidentiary hearings are completed and all responses to record requests have been received, the Presiding Officer issues a final exhibit list and closes the evidentiary record.

4. THE DECISION PHASE

After the close of evidentiary hearings, the applicant, intervenors and limited participants may submit briefs that evaluate the evidence in the record in light of the Siting Board's statute. The Siting Board staff then drafts a Tentative Decision based on the record evidence. The members of the Siting Board review the Tentative Decision and meet to vote on whether or not to adopt the Tentative Decision. If the Siting Board adopts the Tentative Decision, a Final Decision is issued.

The Brief

A brief is a document that presents an opinion, based on information in the evidentiary record and on the Siting Board's statute and standard of review, as to whether the proposed facility should be approved, approved with conditions, or rejected. Briefs may not introduce additional evidence.

At the close of evidentiary hearings, the Presiding Officer establishes a briefing schedule, which typically allows for initial briefs, followed by reply briefs that respond to the arguments presented by others in their initial briefs.

Initial Briefs

The applicant, intervenors, and limited participants may submit initial briefs in accordance with the briefing schedule set by the Presiding Officer. Initial briefs

typically are due two to three weeks after the close of evidentiary hearings. The applicant's initial brief typically summarizes the record of the case and argues that the proposed facility meets all statutory requirements for approval. Initial briefs from intervenors and limited participants may address a broad range of issues or may focus on a few critical issues – for example, a specific proposal for mitigation of an environmental impact. Any argument or proposal raised in the brief must be based on evidence that is in the record. No party or limited participant is under any obligation to file an initial brief.

The Reply Brief

Reply briefs typically are due one to two weeks after the initial briefs were filed. A reply brief should address only those issues raised in other initial briefs; therefore, reply briefs generally are shorter than initial briefs. No party or limited participant is under any obligation to file a reply brief.

Tentative Decision

Following the submission of reply briefs, the Siting Board staff drafts and issues a Tentative Decision, which is distributed to all parties and limited participants. A Tentative Decision may: (1) approve the proposed project or noticed alternative; (2) approve the proposed project or noticed alternative subject to conditions; or (3) deny the proposed project. The Tentative Decision contains sections

addressing each of the major statutory issues in the case. A Decision section at the end of the document summarizes the staff's findings. These summary findings, however, are based on the more detailed findings made throughout the document. It is essential to read the entire text to fully understand the Tentative Decision.

Comment Period

A comment period of at least seven days commences immediately after the Tentative Decision is issued. During the comment period, the applicant, intervenors, and limited participants may submit written comments on the Tentative Decision to the Siting Board. These comments should focus on the consistency of the Tentative Decision with evidence in the record; they may not introduce new evidence. Intervenors and limited participants are not required to submit written comments on the Tentative Decision. However, anyone who wishes to provide oral comments at the Siting Board meeting must first provide written comments that identify the substance of the issues that will be addressed at the meeting.

Siting Board Meeting

Approximately two weeks after the Tentative Decision is issued, the Siting Board holds a public meeting during business hours at its office in Boston to consider whether to approve, amend, or reject the Tentative Decision. At the Siting Board meeting, Siting Board staff members present a

brief overview of the Tentative Decision, respond directly to specific written comments when appropriate, identify any amendments being proposed by staff, and respond to questions from Siting Board members. Following the staff presentation, those who have submitted written comments on the Tentative Decision may address the Siting Board. The Siting Board members may question any speaker regarding his or her comments on the Tentative Decision.

After hearing from the staff, parties and limited participants, the Siting Board considers any proposed amendments to the Tentative Decision. After all amendments have been considered, the Siting Board votes on whether to accept the Tentative Decision as amended.

Final Decision of the Siting Board

The Final Decision, which incorporates all approved amendments to the Tentative Decision, typically is issued on the business day immediately following the Siting Board vote. All parties and limited participants receive a copy of the Final Decision. An aggrieved party in interest may appeal the Final Decision to the Supreme Judicial Court pursuant to G.L. c. 25, §5, as made applicable to the Siting Board by G.L. c. 164, § 69P.

APPENDIX A - Other Reviewing Agencies

A number of state agencies other than the Siting Board have responsibilities in connection with the regulation and development of energy facilities. The two agencies most frequently involved are the MEPA Unit of the Massachusetts Office of Environmental Affairs (617/626-1020) and the Department of Environmental Protection (617/292-5500), especially those divisions concerned with the regulation of air, water, wetlands and waterways, and waste. Other involved agencies could include: the Department of Telecommunications and Energy (617/305-3500), the Division of Energy Resources (617/727-4732), the Department of Environmental Management (617/727-3180), the Massachusetts Natural Heritage and Endangered Species program (508/792-7270), the Massachusetts Water Resources Authority (617/242-6000), the Office of Coastal Zone Management (617/727-9530), the Massachusetts Historical Commission (617/727-8470), the Massachusetts Highway Department (617/973-7500), the Department of Public Health (617/624-6000) and the Department of Public Safety (617/727-3200). Local agencies and officials such as the building inspector, planning board, conservation commission, water department, fire department, historical commission, board of health and department of public works also may be involved.

